IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19438 of 2005
With
SPECIAL CIVIL APPLICATION No. 19439 of 2005
With
SPECIAL CIVIL APPLICATION No. 19441 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UMEMABAI FAKRUDDIN MITHIBORWALA - Petitioner(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :

MR UTPAL M PANCHAL for Petitioner(s) : 1,
MR DIPEN DESAI, ASST. GOVERNMENT PLEADER for Respondent(s) : 1,
MR PRASHANT G DESAI for Respondent(s) : 2 & 3,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 30/09/2005

COMMON ORAL JUDGMENT

1.In all these three petitions as common questions of law and facts arise, they are being disposed of by this common judgment and order.

2. By way of these petitions under Article 226 of the Constitution of India, the respective petitioners have prayed for an appropriate writ, direction and/or order directing the respondent No.2 – Surat Municipal Corporation to make a proposal for variation under Section 70 of the Gujarat Town Planning & Urban Development Act (herein after referred to as “the Act) qua the land of the petitioners. It is also further prayed for an appropriate writ, direction and/or order directing the respondent No.1 – State of Gujarat to consider and decide the application for variation under Section 70 of the Act made by the petitioners on 28th July, 2003. A further prayer is also made for an appropriate writ, direction and/or order directing the respondent No.2 – Surat Municipal Corporation not to dispossess the petitioners from their land and it is also prayed for directing the respondents not to implement the Town Planning Scheme No.2 (Udhna) qua the plot of the petitioners.

3. It appears from the record and it is the common contention on behalf of the petitioners that they are the owners, occupiers and in possession of the lands bearing Plot Nos.17, 18/A and 18/B, which are sub plots paiki of Revenue Survey Nos. 226, 227 and 284 bearing Original Plot Nos.19 of Mouje Udhna, Taluka Choryasi, District Surat and the said sub plots are purchased by the registered sale-deeds dated 31st March, 1981, 31st July 1982 and 31st July 1982 respectively and it is also the contention on behalf of the petitioners that on implementation of Town Planning Scheme No.2 (Udhna) somewhere in and around the year 1977, the land bearing Revenue Survey Nos. 226, 227 and 284 (Original Plot No.19) of Mouje Udhna was sub-divided into 19 different plots and all the 19 plots were sold as freehold plots to different plot holders, out of which, the aforesaid three plots came to be purchased by the respective petitioners. It is submitted that under the preliminary Town Planning Scheme, the original Revenue Survey Nos. 226, 227 and 284 (Original Plot No.19) are given final plot No.29 admeasuring 18,465 sq. mts., and in the redistribution

statement in column of “Remarks” it is categorically stated that “Right of the owners in final plots shall be according to their share in the Original Plots”. However, no individual plots are allotted under the Town Planning Scheme and it is the contention on behalf of the petitioners that 80% of their land is deducted and carved out under the finalized Town Planning Scheme and Final Plot No.28 is taken out of it. It is the contention on behalf of the petitioners that in the year 1990, notices were served upon the petitioners under Section 69(1) of the Act and it is their case that on personal representations by them, they were assured that the variation would be proposed as the scheme is incapable of being implemented, however, no action was taken. It is the case on behalf of the petitioners that in or around mid July, 2003, some of the officers from the Surat Municipal Corporation came for taking the measurement of the properties occupied by the petitioners and they inquired with the said officers and to their utter shock and surprise, they learnt that almost 80% of the land/properties occupied by them are covered in

Final Plot No.28 which is to be allotted to some other individuals and the aforesaid facts were not considered while sanctioning/preparing the Town Planning Scheme and therefore, they preferred an application for variation under Sections 70 and 71 of the Town Planning Act to the State Government and according to the petitioners, while preparing/sanctioning the said Scheme, the relevant provisions of the law and the relevant rules and regulations as well as the directions of the State Government have not been followed and the fact that the original plot was divided into sub plots and were sold to various individuals and the constructions existing thereon is also not considered, according to the petitioners, there is apparently an error and irregularity in the drafting of the final Scheme and therefore, according to the petitioners, this is a fit case for variation. It appears from the record that the petitioners preferred Special Civil Application No.12263 of 2003 with other cognate matters, however, the same came to be withdrawn in view of the pendency of the applications for variation. It

is further the case of the petitioners that thereafter, they have made various representations and by communication dated 12th August, 2004, the respondent No.3 has informed the petitioners that the respondent No.2 – Surat Municipal Corporation is directed by letter dated 2nd July, 2004 not to implement the Scheme with regard to the disputed land and inspite of that fact, the respondent No.2 – Surat Municipal Corporation and its officers were trying to disturb the possession and to implement the Scheme and therefore, they preferred Special Civil Application No.4201 of 2005 which came to be withdrawn by the petitioners with a liberty to file a fresh petition and therefore, the petitioners have preferred the present Special Civil Applications for the aforesaid reliefs.

4. Shri U.M.Panchal, learned advocate appearing on behalf of the respective petitioners has submitted that no separate final plots are allotted to the respective petitioners and even the existing structure on the original plots are also not taken into consideration and 80% of the portion of the

plots of the petitioners along with the construction is carved out in the Final Plots of the other allottes and therefore, there is total errorneous exercise of powers on the part of the Town Planning Officer. It is further submitted by him that the petitioners are the owners of the sub plots situated at Original Survey Nos. 226, 227 and 284 paiki which were renumbered as Original Plot No.19 and at the time of redistribution statement on finalization of the Scheme, one Final Plot No.29 is allotted but individual plots are not allotted and in the column of “Remarks”, it is categorically stated that “Right of owners in final plots shall be according to their share in Original Plots”. Thus, according to Shri Panchal, learned advocate appearing on behalf of the petitioners, there is an error committed by the Town Planning Officer and therefore, it is requested to direct the Surat Municipal Corporation to make proposal for variation and/or directing the State Government to direct the Surat Municipal Corporation to submit the proposal for variation. According to the petitioners, as per the

communication dated 19th January, 2005 by the respondent No.3 – Chief Town Planner, State of Gujarat, the Chief Town Planner has directed the Corporation to submit the proposal for variation and therefore, it is requested to allow the present Special Civil Applications.

5. In response to the notice issued by this Court, Shri P.G.Desai, learned advocate appears on behalf of the Surat Municipal Corporation and the Town Planning Authority. A common affidavit-in-reply is filed opposing the present Special Civil Applications. It is submitted that in view of the withdrawal of earlier petitions being Special Civil Application No.12263 of 2003 with other matters, the present Special Civil Applications are not maintainable as they are filed for similar reliefs. It is further submitted that the petitioners have filed the petitions with regard to the sub plots Nos.18/1, 18/2 and 19 of the Town Planning Scheme No.2, which are situated at Revenue Survey Nos. 226, 227 and 284 and as per the proposals of the preliminary Town Planning Scheme (Udhana), these

lands have been allotted to the owners of the original plot holders of Original Plot No.19 and Final Plot No.29 and the said Town Planning Scheme was sent to the State Government under the provisions of the Act by the Town Planning Officer appointed by the State Government and the Town Planning Officer has sent the preliminary Scheme to the State Government on 29th April, 1986 and the State Government has sanctioned the said preliminary Scheme on 12th October, 1987. It is further submitted that as the preliminary Scheme has already been sanctioned by the State Government and in view of Section 65(3) of the Act the same has an effect as if it is enacted in the Act and under Section 67 of the Act all the right, title and interest in the land has been vested in the appropriate authority free from all encumbrances and therefore, the petitioners are not entitled to any relief as prayed for. It is also further submitted that in lieu of Original Plot No.19 admeasuring 22,157 sq. mts., Final Plot No.29 is allotted in the Town Planning Scheme admeasuring 18,465 sq. mts., and rest of the land from the

Original Plot No.19 is allotted to Final Plot No.28 and for Town Planning Road. It is further submitted that certain portion of the land has been carved out for Town Planning Road and some portion of the land is allotted to other land owners i.e. Final Plot No.28. It is further submitted that the land bearing Survey Nos.285 and 286 have been given Original Plot No.18 and in lieu of this Original Plot No.18 the same has been allotted Final Plot No.28 and some portion of the land from Original Plot No.19 goes to Final Plot No.28. It is further submitted in the reply that the Corporation is required to take possession of the portion going from Original Plot No.19 for Town Planning Scheme Road of 200 fts. which is going from Udhna to Navsari and the Corporation has already started development of the said road and the entire portion has been developed except the portion which is falling under Original Plot No.19. It is further submitted that the Corporation is required to give possession of the portion from Original Plot No.19 to Original Plot No.18, which will be reconstituted as Final Plot No.28 but the Corporation is not in a

position to take the possession of the portion going in road and that the Corporation is bound to implement the Town Planning Scheme. It is also further submitted that the intention of Town Planning Scheme No.2 (Udhna) was declared in 1978 and the draft Scheme was Sanctioned in the year 1982 and the preliminary scheme has been sanctioned in the year 1987 and therefore, all the rights in the portion of Original Plot No.19, which is going in Final Plot No.28 are extinguished so far as the petitioners are concerned. It is submitted that it is ultimately for the Town Planning Authority i.e. the respondent No.2 to propose the variation considering the fact situation. However, no mandamus can be issued directing the Corporation to submit the proposal for variation. It is also further submitted that it is not in the interest of public to submit the proposal for variation and as such, there is no right in favour of the petitioners to pray for variation of the Scheme as a matter of right and even the State Government has also no jurisdiction to direct the Town Planning Authority to submit the proposal for variation and

under the provisions of the Act, only on proposal sent by the Corporation/Town Planning Authority for variation, the State Government can consider the request for variation of the Scheme and therefore, it is requested to dismiss all the present Special Civil Applications.

6.Heard the learned advocates appearing on behalf of the parties.

7.The petitioners claim that they have purchased the Plot Nos. 17, 18/A and 18/B situated in Survey Nos.226, 227 and 284 paiki situated at Udhna in the year 1981-82. It is required to be noted that the intention of the Town Planning Scheme No.2 (Udhna) was declared in the year 1978 and the draft scheme was sanctioned in the 1982. Thus, it appears that the petitioners purchased the plots in question after the intention of the Town Planning Scheme No.2 and what is required to be considered by the Town Planning Authority is the position which was prevailing at the time when the intention of the Town Planning Scheme was declared. Apart from that,

pursuant to the sale-deeds, the petitioners are considered to be the joint owners of the aforesaid survey numbers i.e. Survey Nos.226, 227 and 284, which is subsequently given Original Plot No.19 under the Town Planning Scheme and it is also required to be noted that the preliminary Scheme has been sanctioned by the State Government in the year 1978. Considering the provisions of the Act even at the time of drafting the Town Planning Scheme as well as before the preliminary Scheme, suggestions and objections are always invited by the Town Planning Authority/Officer and nothing is on record that the petitioners ever objected to the same at the time of draft Town Planning Scheme and/or preliminary Town Planning Scheme and therefore, it is not open for the petitioners now to raise any grievance as they have permitted the Town Planning Authority and the State Government to sanction the preliminary Town Planning Scheme. Still at the time of redistribution of the statement in the “Remarks” column it is stated by the authority that “Right of owners in final plots shall be according to their share in the Original

Plot" and therefore, it is for the petitioners to claim their rights from the other co-owners. Apart from that it is required to be noted that the original Revenue Survey Nos. 226, 227 and 284 were admeasuring 22,157 sq. mts., which was given Original Plot No.19 and against which and in lieu of the Original Plot No.19, Final Plot No.29 admeasuring 18,465 is allotted to the persons/plot holders jointly and the remaining portion of the land from Original Plot No.19 is carved out for the purpose of Town Planning Road and some portion of the land is going to the owners of the Final Plot No.28. Now, the petitioners are praying for the variation of the Scheme qua the lands in question i.e. for the land which is going under the Town Planning Road and which is going to the owners of the Final Plot No.28 and admittedly the owners of the Final Plot No.28 are likely to be affected by the variation and still, they are not joined as party – respondents in the present Special Civil Applications, under the circumstances also no relief can be granted in favour of the petitioners in absence of owners of Final Plot No.28.

8.The prayer of the petitioners is to direct the Surat Municipal Corporation to submit the proposal for variation and for which, they have mainly relied upon the communication dated 19th January, 2005 from the respondent No.3 i.e. Chief Town Planner, State of Gujarat, addressed to the Special Officer on Duty, Urban Development and Urban Housing Department, State of Gujarat, the copy of which is sent to the Municipal Commissioner, Surat Municipaliy. On going through the said communication dated 19th January, 2005, it appears that there is no direction by the Chief Town Planner directing the Municipal Corporation to submit the proposal for variation. What is stated in the said communication is that it is for the Municipal Corporation to submit the proposal for variation after finalization of the Scheme. It appears that the petitioners approached some minister and therefore, the aforesaid communication has been sent. Be that as it may, even considering the provisions of the Act neither the State Government nor the Chief Town Planner has any

jurisdiction to direct the Municipal Corporation/Town Planning Authority to submit the proposal for variation. Under Section 70 of the Act, it is for the Town Planning Authority to send the proposal for variation if they so choose and it is not for the State Government to compel and/or direct the authority to send proposal for variation. It is required to be noted that the petitioners have also prayed for an appropriate writ, direction and/or order directing the State Government to consider their applications dated 28th July, 2003 and decide their applications for variation under Section 70 of the Act. It is required to be noted and as stated above, the State Government has no jurisdiction to consider the request for variation under Section 70 of the Act. As stated above, under Section 70 of the Act, it is the Town Planning Authority who has to send the proposal for variation and/or consider the request for variation. Under the circumstances, the said prayer cannot be granted.

9.It is further prayed for an appropriate writ,

direction and/or order directing the respondents, more particularly, respondent No.2 not to implement the Town Planning Scheme pending the applications for variation. Under the provisions of the Act, once the Town Planning Scheme has become final, it is the bounden duty of the Corporation and the Authority to implement the Town Planning Scheme and therefore also, such a prayer cannot be granted.

10.It is required to be noted and as stated hereinabove, none of the petitioners have objected to the same at the time of draft Town Planning Scheme and preliminary Town Planning Scheme and therefore, it is not open for them now to make any grievance, which was not objected by them at the relevant time when the objections and suggestions were invited under the provisions of the Act.

11.As stated in the affidavit-in-reply, the land in question is carved out for the purpose of the Town Planning Road i.e. Surat to Navsari road and except the land in question, the proposal for road has already been completed and the Town Planning Scheme

has been implemented to that extent and it is the contention on behalf of the respondents that it is not in the interest of public at large to vary the Scheme. Once the conscious decision is taken by the Corporation not to propose for variation of the Scheme as it is not in the interest of public at large and therefore, no mandamus can be issued while exercising the powers under Article 226 of the Constitution of India to direct the Corporation/Town Planning Authority to submit the proposal for variation of the Scheme as it is ultimately for the appropriate authority under the Town Planning Act to consider *whether the scheme is to be varied or not.*

12.For the reasons stated above, there is no substance in any of the petitions and they are required to be dismissed and are accordingly dismissed. Notice in each matter discharged.

(M.R.SHAH, J.)

kdc.